Vet. App. No. 15-3431

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JEAN JONES,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE, SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS
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	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 15-3431
	)	
ROBERT A. McDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE

I. ISSUE PRESENTED

Whether the Board of Veterans' Appeals (Board) in its June 29, 2015 decision, properly denied Appellant's claim of entitlement to an effective date prior to April July 25, 2007, for the award of a total disability rating based on individual unemployability due to service-connected disabilities (TDIU).

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

Jurisdiction is based upon 38 U.S.C. § 7252(a), which grants the U.S. Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board of Veterans' Appeals.

B. NATURE OF THE CASE

Appellant, Jean Jones, appeals the Board's June 29, 2015, decision that denied entitlement to an effective date prior to July 25, 2007, for the award of a total disability rating based on TDIU. [Record Before the Agency [R.] at 2-20].

C. STATEMENT OF THE FACTS

Appellant had active service in the U.S. Navy from July 1953 to July 1957. [R. at 1472].

Following discharge, in December 1957, Appellant was awarded service connection for a right knee condition. [R. at 1381-83]. Later in May 1964, the Regional Office (RO) issued a rating decision increasing Appellant's disability rating for her service-connected right knee and granting service connection for residuals of a left ankle fracture. [R. at 1332-34]. Appellant did not appeal.

In May and August 1978, Appellant submitted statements detailing her difficulties maneuvering due to her service-connected disabilities and indicating her retirement due to disabilities. [R. at 1206, 1199-1200].

Subsequently, on October 16, 1978, the RO issued a Deferred or Confirmed Rating Decision. [R. at 1180, 1183]. In a section labelled "Part II – Confirmed Rating Decision", the RO stated "Symptomatology and findings is cited. Evidence fails to warrant increased evaluation and S/C right knee condition. Veteran developed low back pain after lifting heavy objects in 1974. This condition is unrelated to her S/C disabilities and she is not unemployable due to S/C conditions." [R. at 1183].

An Adjudication Worksheet (VA Form 21-6747) dated October 20, 1978, indicated the name and address of Appellant, and outlined the information provided in the October 16, 2016, Confirmed Rating Decision in the "Remarks" section. [R. at 1181]. The Adjudication Worksheet also indicated a copy was sent to Disabled American Veterans, Appellant's representative at the time. *Id.* Following this decision, Appellant did not appeal.

In October 2000, Appellant filed a claim for increased evaluations for her service-connected right knee and lower leg conditions. [R. at 1160]. In November 2000, Appellant underwent a VA examination for her right knee and left ankle. [R. at 1146-50]. The examiner noted Appellant's medical history as it related to her disabilities, as well as her current symptoms of pain and functional loss. [R. at 1146]. Appellant reported that though she was able to brush her teeth, dress herself, and shower, she was limited in cooking, walking, grocery shopping, vacuuming, driving, taking out the

trash, pushing the lawn mower, gardening, and climbing stairs. [R. at 1146-47]. Regarding her employment history, Appellant reported she worked for 11.5 years as a printer, until she stopped working in 1974. [R. at 1147]. She denied current employment. *Id.* The examiner determined Appellant was limited in standing and walking, and would require an assistive device to ambulate for short and long distances, and should avoid jumping, stepping or walking on uneven ground. [R. at 1150].

In July 2001, the RO issued a rating decision increasing Appellant's service-connected right knee evaluation to 20 percent, and increasing her service-connected left ankle evaluation to 10 percent. [R. at 1105-07, 1112-14].

In July 2007, Appellant filed a claim for entitlement to an increased rating for all service-connected conditions. [R. at 1053]. In a November 2007 rating decision, the RO increased Appellant's evaluation for her left ankle disability to 30 percent, continued her 20 percent evaluation for instability of the right knee, and continued her evaluation of 10 percent for limitation of extension of the right knee. [R. at 1630-34]. In July 2008, Appellant filed a Notice of Disagreement. [R. at 986]. The March 2009 Statement of the Case (SOC) continued the ratings assigned in the November 2007 rating decision. [R. at 907-23]. Appellant filed a substantive appeal in May 2009. [R. at 565].

In an October 2010 decision, the Board denied (1) entitlement to a disability rating greater than 30 percent for residuals of a fractured left ankle with degenerative changes, and (2) entitlement to a disability rating greater than 20 percent for postoperative instability of the right knee, and granted (3) a disability rating of 40 percent, but not higher, for limitation of extension of the right knee with degenerative joint disease. [R. at 774-90]. Appellant filed an appeal to this Court.

In February 2011, the RO issued a rating decision denying entitlement to TDIU. [R. at 756]. In April 2011, Appellant submitted a Notice of Disagreement. [R. at 730].

In November 2011, Appellant and the Secretary entered a Joint Motion to Remand before this Court, vacating the Board's October 2010 decision, but preserving the finding that Appellant was entitled to a 40 percent rating for limitation of extension for the right knee with degenerative joint disease. [R. at 264-68]. On remand, the parties instructed the Board to provide a statement of reasons or bases considering whether special monthly compensation (SMC) was appropriate. *Id.*

In May 2012, the Board issued a Remand Order, instructing the RO to consider whether entitlement to SMC was warranted. [R. at 503-513]. In that Order, the Board noted that though Appellant expressed disagreement with the RO's February 2011 rating decision denying

entitlement to TDIU, a SOC had not yet been issued. [R. at 509]. As such, the Board requested the RO issue a SOC on the issue of entitlement to TDIU. [R. at 511].

A June 2013 rating decision granted entitlement to TDIU effective April 27, 2010. [R. at 253-58]. However, a month later in July 2013, the RO issued a rating decision awarding entitlement to SMC based on loss of use of bilateral lower extremities from July 25, 2007. [R. at 217-26]. The rating decision also determined TDIU was no longer warranted because Appellant had "a combined disability rating of 100 percent, effective July 25, 2007, prior to the date for which the individual unemployability became effective", and therefore, "[a] combined disability rating of 100 percent is the greater benefit". [R. at 225-26].

In August 2013, Appellant filed a Notice of Disagreement with the effective date assigned to the award of TDIU by the June 2013 rating decision, and requested an effective date of April 1967. [R. at 178-80]. In an August 2014 SOC, the RO denied entitlement to an effective date prior to April 27, 2010. [R. at 122-53]. Appellant filed her substantive appeal in August 2014. [R. at 115]. The RO confirmed the denial of an earlier effective date for the award of TDIU in a November 2014 Supplemental SOC. [R. at 89-93].

The Board issued the decision currently on appeal on June 29, 2015. [R. at 2-20]. Appeal to this Court followed.

III. SUMMARY OF ARGUMENT

The Board's denial of entitlement to an effective date prior to July 25, 2007, for the award of TDIU, as it is not clearly erroneous. The Board correctly found that the presumption of regularity applies and that Appellant failed to present clear evidence to rebut the presumption. The Board properly held that July 25, 2007, was the earliest effective date to which Appellant was entitled benefits for TDIU.

IV. THE SECRETARY'S ARGUMENT AND RESPONSE TO APPELLANT'S CONTENTIONS

Appellant initially argues that the Board erred in finding that she received notice and an explanation of appellate rights following the October 1978, rating decision. Appellant's Brief (AB.) at 7-14.

Under section 5104(a), the Secretary is obligated to "provide to the claimant . . . notice of [a VA] decision;" such notice "shall include an explanation of the procedure for obtaining review of the decision." 38 U.S.C. § 5104(a). Under the presumption of regularity, it is presumed that Government officials discharged their official duties properly, in good faith, and in accordance with applicable law and governing regulations. *See Marsh v. Nicholson*, 19 Vet.App. 381, 385 (2005); *Ashley v. Derwinski*, 2 Vet.App. 307, 308 (1992). "The doctrine thus allows courts to presume that what appears regular is regular." *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001). Whether clear evidence exists to rebut the

presumption of regularity is a question of law that the Court reviews de novo. *Id*.

Here, the Board found that Appellant did not submit either new and material evidence or a notice of disagreement within one year of the October 1978 decision, extinguishing the claim stream upon which her current request for an earlier effective date is based. [R. at 8]. The Board explained that, although the claims file did not contain a copy of the notification letter pertaining to that decision, the presumption of regularity, buttressed by the October 20, 1978 VA Form 21-6747, established that VA had properly notified Appellant of her right to appeal that decision and she failed to timely exercised that right. [R. at 8-10].

Appellant essentially argues the presumption of regularity does not apply because the record does not include a copy of a letter notifying her of the rating decision, and her appellate and procedural rights. AB. at 11. Appellant relies on *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004) to support the contention that the lack of a copy of the notice of appellate rights in the record serves as sufficient "'evidence to the contrary" that the presumption of regularity has been rebutted'". AB. at 12. However, the Federal Circuit in *Miley* held that there was "no legal basis for holding that the presumption of regularity may not be employed to establish, in the abundance of evidence to the contrary, that certain ministerial steps were taken in accordance with the requirements of law." 366 F.3d at 1347.

The Secretary concedes that the record does not include a copy of the notice letter associated with the October 1978 decision or notice of appellate rights. However, even if the record contained this notice, it would still be necessary to rely on the inference that the notice of the rating decision and appellate rights were, in fact, mailed to Appellant with the rating decision. *See Miley*, 366 F.3d at 1347. Accordingly, the fact that these forms are not in the record is not dispositive, as the absence of a particular document in the claims file does not preclude the application of the presumption of regularity. *Id.* ("…no legal principle bars the use of the presumption of regularity simply because the record does not contain a dated copy of the decision notice itself or some other document reflecting the precise date on which the notice was purportedly sent.").

Appellant's argument, if accepted, "would have the Court render it a presumption of irregularity by shifting the burden back onto the Secretary in the case of a record silent regarding the issue of notice, thereby imposing a presumption that the VA failed to discharge its duties properly." *Miley*, 366 F.3d at 1346 citing this Court's holding in *Miley v. Principi*, 18 Vet.App. 411 (2003).

The October 20, 1978 Adjudication Worksheet (VA Form 21-6747) infers that a rating decision was mailed to Appellant at her address in Anaheim, California and to her representative. [R. at 1181]. Appellant does not assert, nor does the evidence of record suggest that Appellant

did not receive the rating decision. Moreover, the record does not contain any evidence suggesting that the address reflected in the VA Form 21-6747 was incorrect or that any correspondence from VA was returned as undeliverable. *See Mindenhall v. Brown*, 7 Vet.App. 271, 274 (1994) (holding that the presumption of regularity was not rebutted by the veteran's assertion of nonreceipt of notice documents and emphasizing the fact that VA had the correct address on file at the time of the presumed mailing). It can presumed that a notice of appellate rights was attached thereto. *See Miley*, *supra*; *see also Clarke v. Nicholson*, 21 Vet.App. 130, 133 (2007) (applying the presumption of regularity to the RO's mailing of a rating decision).

The burden is on Appellant to produce clear evidence that VA did not follow its regular mailing practices or that its practices were not regular; absent the production of such evidence, delivery is proven. *See Clarke*, *supra*. While Appellant argues that the evidence in this case provides "clear evidence to the contrary that VA did not properly discharge its duties", she fails to produce any clear evidence of irregularity. AB. at 13. As noted above, the absence of a letter of notice does not preclude application of the presumption of regularity and Appellant has not distinguished the facts of her case from *Miley* or otherwise persuasively analogized her case to precedent finding that the presumption of regularity did not attach in the first instance. Absent Appellant's production of clear

evidence to the contrary, the Board properly found that Appellant was notified on the October 1978 rating decision and of her appellant rights. *Dolan v. Brown*, 9 Vet.App. 358, 362 (1996).

In the alternative, Appellant argues the Board erred by failing to consider either her October 2000 claim for increased rating for service-connected disabilities or the November 2000 VA examination, as reasonably raising the issue of entitlement to TDIU. AB. at 14-16.

Here, the Board noted that in October 2000, Appellant filed a claim for increased disability ratings for her service-connected right knee and lower leg conditions, as well as service connection for a left leg condition, and was provided VA examinations in November 2000 and August 2001. [R. at 10]; *see* [R. at 1160 (October 2000 Claim), 1146-50 (November 2000 VA examination), 1091-1101 (August 2001 VA Examination)]. The Board determined that neither the October 2000 claim, nor the November 2000 or August 2001 VA examination reports, "include any statements that can reasonably and liberally be construed as indicating an intent to apply for a TDIU." [R. at 11]. As such, the Board concluded none could serve as the bases for an earlier effective date for the award of TDIU. *Id.*

Specifically, Appellant argues the Board failed to apply the correct legal standard under *Rice v. Shinseki*, 22 Vet.App. 447 (2009), when it determined the October 2000 claim for increased ratings did not include a claim for TDIU. AB. at 14. However, as explained by the Board, "TDIU,

either expressly raised by the Veteran or reasonably raised by the record, is part of the claim for an increased rating." [R. at 12]. Indeed, while a claim for increased disability compensation encompasses the issue of possible entitlement to TDIU, the issue is not raised until evidence of unemployability is actually presented. *See Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) ("Once a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the 'identify the benefit sought' requirement of 38 C.F.R. § 3.155(a) is met and VA must consider TDIU.").

Appellant does not explain, and the Secretary cannot decipher, any basis for concluding the October 2000 claim reasonably raises the issue of unemployability. Appellant's claim states only:

> I am the above named veteran currently rated 10% [service connected] for a right knee condition and 0% [service connected] for a lower leg condition.
>
> It is my belief that my condition has grown worse over the years. This is my request to reopen my claim for increased compensation.
>
> I request the [Department of Veterans Affairs] schedule me for an examination in support of my claim for my right knee and lower leg condition.
>
> I request the [Department of Veterans Affairs] rate my left leg condition as secondary to my right leg condition. I have had to favor my right leg which has created my left leg condition.

[R. at 1160]. There is no indication within the statement that Appellant is unable to maintain employment due to her service-connected disabilities for which she requested increased ratings. Accordingly, TDIU is not reasonably raised by the October 2000 claim.

Appellant also asserts the November 2000 VA examination reasonably raised the question of entitlement to TDIU. AB. at 14; *see* [R. at 1146-50]. In support of this argument, Appellant points to evidence in the examination report that she had not worked since 1974, and suffered "horrible", constant pain, as well as other functional losses that limited activities of daily living. [R. at 1146-47]. In determining the November 2000 examination did not raise the issue of unemployability, the Board noted the report included "only general descriptions of the Veteran's work history" and lacked "language that can be interpreted as evidence of service-connected unemployability." As such, the Board concluded "the Veteran's mere statement that she had not worked since 1974 [does not constitute] an indication of service-connected unemployability, or any other such an intent to apply for a TDIU." [R. at 11].

Indeed, with respect to employment history, the November 2000 examination report states merely, "[t]he veteran worked until 1974 as a printer for 11.5 years. She is not working at the present time." [R. at 1147]. Though the report does note symptoms and functional limitations of Appellant's service-connected knee and ankle disabilities, there is no

opinion provided regarding Appellant's ability to engage in activities of employment, nor does Appellant associate her unemployment with her service-connected disabilities. Appellant has, therefore, failed to identify clear error in the Board's discussion. Because there is no evidence in the November 2000 examination that Appellant was unable to work, much less unemployable as a result of her service-connected disabilities, the Board did not err in determining the examination report did not raise the issue of TDIU.

Appellant, as such, has failed to carry her burden of demonstrating prejudicial error in the Board's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (applying the rule of prejudicial error). The Board's June 2015 decision discussed the relevant evidence, and determined that a claim for TDIU was not received until July 2007 following the final October 1978 rating decision. [R. at 15]. The Board further determined that because there was no evidence "establishing that it was factually ascertainable that the Veteran was unable to secure of follow a substantially gainful occupation during the one-year period preceding the [claim], Appellant was not entitled to an effective date for the award of TDIU earlier than July 25, 2007. [R. at 16]. Therefore, the Board properly denied Appellant's claim for an effective date prior to July 25, 2007 for the award of TDIU.

CONCLUSION

WHEREFORE, the Secretary submits that the Board properly denied entitlement to an effective date earlier than July 25, 2007 for the award of TDIU, and the decision on appeal should be affirmed.

Respectfully submitted,

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